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LABOR AND EMPLOYMENT LAW SECTION

"EMPLOYEE PARTICIPATION AND LABOR POLICY: WHY THE TEAM ACT SHOULD BE DEFEATED AND THE NATIONAL LABOR RELATIONS ACT AMENDED"

To be delivered by:

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I am indeed pleased to be with you here in Omaha, Nebraska, today -- particularly at the time of the College World Series. My one regret is that the institution at which I have taught, Stanford University, is not part of this event. But, the high quality of Stanford teams, their College World Championships here in Omaha most recently in '87 and '88, make me confident in the belief that my good friend, Stanford Coach Mark Marquess, will return here with another fine team in 1997.

This is an exciting and interesting time for college baseball -- and indeed for the game itself played at both the major league and the minor league level. Notwithstanding my duties at the National Labor Relations Board over these past few years, I have had the chance not only to see a good deal of big league baseball -- and this is my first College World Series -- but also to see a variety of minor league teams like the San Jose Giants, the Bowie Bay Sox, the Cedar Rapids Kernels in your neighboring state of Iowa, and the Trenton Thunder, the double A farm team of my beloved Boston Red Sox. Last week, en route to a speaking engagement, I spent a bucolic afternoon in Buffalo as the Bisons squared off against the New Orleans' Zephyrs. "Let's go Buffalo!" the crowd shouted to its hometown Herd.

With the increasing success of minor league and college baseball, I wonder whether more baseball owners will want to invest where the action is. A wonderful by-product of the game's popularity below major league level is stronger and more interesting minor leagues as the simultaneous expansion of major league baseball has diminished the quality of pitching. Perhaps more owners will invest in new exciting minor league franchises. That could get those who are prone to nostalgia, like myself, back to a 16 team entity where I would know, once again, every player and average, as I did between '46 through '51!

I want to take this opportunity here to acknowledge Nebraska's good friends of our Agency -- and myself during my confirmation process -- Senators Bob Kerrey and Jim Exon. And I also want to pay special tribute to the ranking minority member of our Appropriations Subcommittee from just across the border in Iowa, my good friend, Senator Tom Harkin. Senator Harkin has been a pillar of strength for me and the Board in the difficult days of the 104th Congress. Like others in the Congress, they have been supportive of our Agency's attempt to faithfully implement the principles of the statute in accordance with its objectives and the concept of the rule of law removed from immediate political passion.

This is my first visit to this city which has such an association with both labor and baseball -- the former through premier actor Marlon Brando, who starred in "On the Waterfront," as well as orator and perennial presidential candidate, William Jennings Bryan, the "boy orator of the Platte." His famous line from the 1896 Democratic convention about not crucifying mankind on a cross of gold has stuck in my mind since I was a schoolboy. As an arbitrator, I feel an affinity for Bryan also because when he was Secretary of State under President Woodrow Wilson, he made a distinctive contribution to world law by advocating arbitration to prevent war.

And today in Washington, the Senate Republicans, who have giants like Senators Mark Hatfield, Arlen Specter and John Chafee, can look back with pride to the legendary Republican Senator George Norris who ably represented Nebraska for 41 years. As a Congressman he led the battle for reforms in House rules to reduce the autocratic powers of House Speaker Joe Cannon, and during his 33 years in the Senate he introduced the bill establishing the TVA and co-authored the Norris-LaGuardia Act, a precursor of the National Labor Relations Act which sets forth its public policy preference for freedom of association and collective bargaining which remains to this day in our law. Under Norris' leadership, the bill was passed by a huge majority of Republicans and Democrats in the Senate despite opposition by the American Bar Association and employer groups including the U.S. Chamber of Commerce.

I could not come to Nebraska without noting that my Special Assistant, Ralph Deeds -- whom I was able to lure away from the General Motors Corporation two years ago -- has roots in Lincoln and Cherry Counties, where his grandparents homesteaded at the turn of the century.

In the baseball arena, Nebraska native Richie Ashburn, the Hall of Famer Philadelphia Phillies center fielder, whose throw from center field in the ninth inning of the last game against the Brooklyn Dodgers, cut down Cal Abrams who would have been the winning run and gave the Phillies the 1950 National League Championship in the tenth inning of that game.

And Omaha's own blazing fast baller, Bob Gibson, was a member of the first black championship team in Nebraska American Legion play. His 1968 1.12 ERA while with the St. Louis Cardinals still stands as a National League record, bettered only by Dutch Leonard's 1914 record of 1.00 with the Red Sox.

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The earlier days of this week took me slightly beyond the half way mark in my term as Chairman. I think that we have accomplished much during these 27 months -- and I hope that we can do more in the nearly 27 months that are to follow.

I think that I have been faithful to my pledge to the Senate made during my confirmation hearings on October 1, 1993, to expedite our procedures, promote settlement over litigation and bring the Board back to the center as an impartial arbiter between labor and management.

I am particularly pleased that this week the United States Supreme Court in *Auciello Iron Works Inc. v. NLRB*[1] unanimously held that our Board "reasonably concluded that an employer challenging" an incumbent union's majority status on the ground of good faith doubt subsequent to the making of a contract violates its duty-to-bargain obligations.

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[1] Sup. Ct. No. 95-668 (June 3, 1996).

This is the second time in the past half year that the Court has unanimously affirmed the Board and, in so doing, deferred to the Agency's expertise. It is the third time this Term that the Court has upheld the Board, providing the Agency with a 3-0 record since October 1995.

I am pleased with the Court's affirmances of the Board -- and of the record that we have obtained during this past Term and in the Circuit Courts of Appeals.[2] This week's victory is yet another vindication of the Agency's professionalism and excellence.

Our score before the Justices of the Supreme Court in baseball terms is 23-4 with two unanimous decisions, and a 5-4 holding in *Holly Farms Corporation v. NLRB*.[3] While this is an enviable record, we must dedicate ourselves anew to getting the same result in the second half of my term.

After all, it is 46 years ago this weekend when my Boston Red Sox beat the St. Louis Browns by a combined score of 49-8 in the first two games. On this day the Sox won 20-4 and on June 8 they won 29-4, only to lose the third one on June 9, 12-7 to the Brownie ace Ned Garver. As we have done these past 27 months, we will do our best not to let those third and ensuing confrontations get away.

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The employment relationship, in which our Board is involved, and the need for some form of representation in it, is one of the most fundamental aspects of one's existence in our society today. We seem to assume the need for contracts in so many commercial relationships involving real property, automobiles and the like -- and, indeed, in the marriage relationship itself -- as an ordinary way of ordering our existence. But one of the most important aspects of our existence, along with religion and core ethical values about the family and our duty to our neighbors in the world around us, is the dignity of work.

I think that President Clinton has been right to emphasize the importance of work in the welfare debate. It is important for our people to have every practicable incentive to work. As President Clinton has long recognized, such incentives require an investment in job training, education and child care, as well as an adequate minimum wage.

The dignity of work is essential to one's own sense of self worth. It is vital to our ability to provide for the family both in our material ability to put food on the table, as well as to expand the horizons, hopes, and aspirations of those to whom we bequeath our values and the world's environment in which they must live.

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[2] Of the 68 Board decisions, which have gone to the Courts of Appeals during my tenure, 73.5% were enforced in full. Under my predecessors during the two years preceding the Clinton Board, the comparable number of decisions enforced in full was 69.5%.

[3] 116 S. Ct. 1396 (April 23, 1996).

My view is that the dignity of work can be best realized through some form of representation or involvement by employees at the workplace. For sixty-one years the National Labor Relations Act and my Agency, the National Labor Relations Board, have promoted the practice and procedure of collective bargaining as the preferred form of representation. This statutory objective is a goal to which I have long subscribed. The decline of the labor movement, a matter which its new leadership is attempting to address both on the organizational and political front, has created a vacuum of representation at the workplace level. This has not been without immediate consequences.

One of them is the attempt I mentioned of the movement to revive itself. The second is that a wide variety of regulatory mechanisms, both at the federal and state level, have occupied the vacuum -- wrongful discharge litigation, health and safety regulations, pension legislation, and fair employment practices law.

But now states like Washington, Oregon, and Nevada have mandated health and safety committees because they recognize that the problems of modern employment legislation cannot be decreed by the state alone. They require mechanisms in which employees are involved so as to comply with law and to resolve differences short of sometimes tortuous administrative or judicial litigation.

This state legislation has helped to renew focus upon representative structures generally. For instance, although "members' only" collective bargaining, sometimes on a limited number of issues, is lawful under our statute and exists in industries like entertainment, there is very little of it because our law does not promote it. Three years ago, I advocated that our statute be amended so that employees, with or without outside union assistance, could deal with issues like health and safety and discipline with employers, through the force of law -- even when a union has not prevailed as exclusive bargaining representative for all employees in a unit as the result of the testing of employee sentiment through an NLRB-conducted election. That idea, like early proposals that I and colleagues of a California State Bar committee, which I chaired 12 years ago, advocating wrongful discharge legislation, does not seem to have taken off to date.[4]

But another form of representation for workers, i.e., employee committees, quality work circles, teams and the like, has received a good deal of attention. The dynamics of all this are rooted in two developments: (1) foreign competition from the Pacific Rim and Europe which has resulted in devastating layoffs beginning in the '70s; (2) a sense that employee involvement is intrinsically valuable as a means both to enhance product quality and to recapture lost ground in the global marketplace, as well as to expand in the new industries which are so frequently at the cutting edge of technological innovation. One of the ironies here is that Edward Deming, one of the pioneers of employee participation, brought the concept to Japan during that country's post-World War II devastation and

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[4] California State Bar Committee Report, "To Strike A New Balance," in *Labor & Employment Law News*, Feb. 8, 1994 (on file at Stanford Law School Library).

was able to preach the gospel more effectively in the Far East than he was able to do in his own country in which he was a prophet without honor. Only the '70s brought attention to his ideas again.

The fact that new systems of representation have been slow to evolve is rooted in our inability to translate the principles of political democracy, which have been historically so well understood in our country, to the workplace. The idea of economic democracy in the equitable ordering of employment relationship has lagged light years behind comparable political developments.

I think that anything that promotes employee involvement, participation, and cooperation between employees and managers and, as a consequence, erodes the "them and us" mentality all too prevalent in American industry is to the good. The National Labor Relations Board, which I head, has attempted to promote cooperation between both sides in both a union and non-union environment. The statutory issue in our cases is generally whether employers have violated Section 8(a)(2) of our statute, the so-called anti-company union provision, which makes it unlawful for employers to dominate, assist, or support labor organizations -- and the statute defines "labor organizations" to include entities which are not traditional unions.

The Clinton Board has made great strides toward promoting the lawfulness of employee committees under the statute.[5] But I am of the view that there are pitfalls and ambiguities in Section 8(a)(2) which make its amendment desirable -- just as there are problems with other provisions of our law which impede effective union organizational efforts and balanced collective bargaining. My judgment is that amendments in a wide variety of areas would enhance mutual independence and partnership and would, thus, serve well the public interest. The Republican Party's answer to this problem -- the so-called "TEAM Act" -- however, is classic overkill of a kind which could promote the discredited company unions which the National Labor Relations Act was designed to repress.

The TEAM Act, as written, actually should be called the Employee Domination Act since it would allow employers to impose representational arrangements -- and those which provide for no effective representation -- upon employees regardless of their wishes, appointing the workers' representatives for them, determining what issues should be taken up, and what the structure of the system would be.

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[5] See William B. Gould IV, *"Beyond 'Them and Us' Litigation: The Clinton Board's Administrative Reforms and Decisions Promoting Labor-Management Cooperation,"* speech before Indiana University School of Law, Indianapolis Seventeenth Annual Seminar on Labor-Management Relations on February 29, 1996, as reported in BNA *Daily Labor Report,* 42 DLR A-1, E-38 (March 4, 1996).

The TEAM Act is contrary to the democratic assumptions of America's society which presuppose our ability and basic right to select representatives of our own choosing -- assumptions which ought to be applicable to the employment relationship.

There are a number of fundamental errors that have emerged in the discussion of the TEAM Act and what our policy should be toward employee committees, teams, and the like. First is the claim that there are "illegal" subjects of discussion between employees and employers in non-union establishments, and that workers and managers are precluded from communicating with one another. This is completely false. Employees and employers can discuss anything they want under present law -- everything from wages, overtime payments or assignments, rest periods, problems relating to the quality of the product or sales. Nothing is off the table.

The peril for American employers is that it is unlawful for them, under the National Labor Relations Act, to dominate, or to assist financially or otherwise employee committees or unions themselves. The Republicans have made much of and continuously railed against the 1992 *Electromation*[6] decision, which was written solely by appointees of Presidents Reagan and Bush, -- a decision which adhered to six decades' precedent in concluding that it was unlawful for management to name the leaders of employee committees and unilaterally determine their structure. *Electromation* was only remarkable insofar as the attention given to it by the Board itself which, for reasons best known to the members then in Washington, held oral argument -- as well as various "inside the Beltway" groups that sought to create the false impression new law was being made or could be made.

Notwithstanding the flawed nature of the TEAM Act, the National Labor Relations Act is badly in need of revision. The point applies to a problem which the Republicans have studiously avoided -- the need to provide for a more level playing field between unions and employers as they compete in the marketplace of ideas for the allegiance of workers in organizational campaigns. The lawfulness of employee committees in a non-union environment is important as well. Congress can and should do more to build the bridge of communication between such employees and employers.

The principal deficiency of the current law lies in its ambiguity. First, while the Act prohibits "financial" assistance or other "support," these terms are not self-defining. Literally, if an employer were to grant an employee committee the use of plant facilities, such as copying machines and meeting rooms, it would run afoul of the statute -- although it is unusual to find a violation on this basis. Second, in an even more bizarre way, the Act makes it unlawful to dominate or assist an organization that is concerned with employment conditions. At the same time, an organization in which the employees and employer representatives discuss so-called "managerial" matters such as product quality or sales is beyond the purview of the statute, thus immunizing the "top down" imposition of employee structures upon workers from legal regulation.

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[6] *Electromation, Inc. v. NLRB*, 35 F.3d 1148 (7th Cir. 1994) enfg. 309 NLRB 990 (1992).

In a non-union situation, the sensible response to all of this is to allow employee groups, with or without a management representative component, to discuss anything that they would like to, whether it be wages, break periods or the problems confronted in selling the product. The more that workers know about the enterprise and the better that they are able to participate effectively in decision making, the more likely it is that both democratic values and competitiveness are enhanced. And, if the law is simplified, lay people -- ordinary workers and small business persons -- will be able to adapt to their own circumstances and avoid reliance upon wasteful litigation and the high priced counsel that go with it.

In my Bastille Day *Keeler Brass*[7] concurring opinion of last summer, I expressed my view that the U.S. Court of Appeals for the Seventh Circuit in *Chicago Rawhide Mfg. Co. v. NLRB*,[8] was correct in its holding. In that case, the committee in question originated with the employees and met outside the presence of management. Management did not determine the subject matter to be considered and did not determine who should be on the committee or have veto power over any committee recommendations.[9] These facts established the independence of the committees.

In *Keeler Brass* I stated my view that, inasmuch as most of the initiative for cooperative efforts in the workplace has come from employers, particularly in the non-union sector, we should not conclude that the committee is unlawful simply because the employer initiated it. I stated that the focus should be on whether the organization allows for employee action and choice. I said:

> If, for example, the employer did nothing more that tell employees that it wanted their participation in decisions concerning working conditions and suggested that they set up a committee for such participation, I would find no domination provided employees controlled the structure and function of the committee and their participation was voluntary.

At the same time, employer initiatives must be scrutinized carefully. I think what Justice Souter said this week in the different context relating to an employer's challenge to an incumbent union's majority status in the *Auciello* decision has some relevance: "The Board is . . . entitled to suspicion when faced with an employer's benevolence as its workers' champion . . . ."

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7 317 NLRB 1110, 1116-1119 (1995).

8 221 F.2d 165 (7th Cir. 1955).

9 The question of the propriety of a veto power over committee recommendations is quite different from the issues of representativeness, structure and issues to be discussed which I address above. I have not expressed my views on this subject.

While I am of the view that my concurring opinion has served as something of an impetus for our subsequent decisions of this past winter, the fact is that a majority of the Board has not yet subscribed to the views that I have expressed on employer initiatives. This is one reason why a clarifying amendment to the statute which would allow for employer initiatives would be appropriate -- and I said so in *Keeler Brass* itself.[10] In *Keeler Brass* I also said that if the employer created an employee participation organization in response to a union organizational campaign, I would "draw the inference that the organization was designed to thwart employee independence and free choice."

New amendments should specifically incorporate such a provision so as to avoid any ambiguity. Similarly, where a union is the exclusive bargaining representative, the question of whether an employer may unilaterally institute an employee structure subsequent to bargaining to impasse has never been resolved by the Board. The TEAM Act does not address this issue, but I think legislation amending Section 8(a)(2) should do so.

Employers ought to be able to promote the creation of and to subsidize employee groups. In the real world that is what is happening anyway. With workers unrepresented by unions in 85 percent of the workforce, how else can such systems flourish?

As I said in my letter of May 9, 1996 to Senator Dianne Feinstein of California, the final and most important aspect of any change should be an assurance that such employee organizations will be autonomous, that is to say, that they can select their own representatives or leadership and determine what it is that they want to discuss with management and how their organization should be structured. This does not mean that a ballot-box procedure must be used in each establishment. But the employer that promotes such an employee group must be prepared to allow for genuine employee participation in leadership as well as involvement on employment issues.

Deliberately, the TEAM Act does not provide for democracy in the workplace. Its purpose is to permit employers to dominate employees. The proposal is inconsistent with the most basic teachings of our Constitution and the National Labor Relations Act itself. And accordingly the Senate should reject it.

In addressing these policy issues -- issues which, like my previous discussion in various public forums of permanent striker replacements,[11] are intimately connected with the administration of the National Labor Relations Act, which I am charged to interpret --

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[10] 317 NLRB 1110, 1118, fn. 13 (1995).

[11] William B. Gould IV, *Agenda for Reform: The Future of Employment Relationships and the Law* (MIT Press) 1993, Chapter 6. See also, *"The Right to Strike in a Democratic Society"* speech given February 24, 1995 before the Bar Association of San Francisco, Labor and Employment Law Section as reported in BNA *Daily Labor Report* 38 DLR A-8 (February 27, 1995).

I recognize that there are some (generally they are those who disagree with my positions) who say that it is not appropriate for me to speak on such matters.

Last Sunday a *New York Times* article about the Board and me compounded the confusion on this subject by stating that it was "unusual" for a regulatory official to speak out on law reform issues. Let me take this opportunity to respectfully suggest to you that my critics and the *Times* are misinformed.

In the first place in connection with the TEAM Act legislation, I have been invited by many lawmakers, such as Senator Feinstein of my own state of California, to provide my views. A number of the Republican members of the House of Representatives, during last fall's debate in that body suggested that I was in support of their legislation because of my previous writings -- an impression of which I attempted informally to disabuse them. Some may know that Congressman Gunderson of Wisconsin circulated a "Dear Colleague" letter to every member of the House of Representatives intimating my support for the Republican position.[12]

Senator Kassebaum, in a statement last month from the floor of the Senate, suggested that while I was opposed to the TEAM Act, my proposals supported the positions put forward by the Republicans.[13] This is not an accurate characterization of my views.

Second, Senator Kennedy, Senator Hatch, and Senator Durenberger stated their interest in my legislative views on a wide variety of issues during my confirmation hearing before the Senate Labor and Human Resources Committee on October 1, 1993.

But the third factor relating to my willingness to speak out from time to time is one well understood by lawyers such as yourself -- it comports with precedent! It has been done before!

As I pointed out to Congressmen Goodling, Fawell and Hoekstra on April 19, 1995[14] the great tradition of chairmen of independent administrative agencies -- particularly where one has spent a lifetime of involvement with the interpretation and administration of

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12 This letter may have prompted Congressman Talent to say the following:

> People say there is not any problem, take it up with the Chairman of National Labor Relations Board. He says there is a problem and so do the employees and the employers and the consultants who came and testified at these hearings.
> *Congressional Record*, H9529 (September 27, 1995).

See also Congressman Talent's remarks on my views at H9520. Similarly, Congressman Goodling, who wrote me protesting the propriety of my speech on permanent replacements for economic strikers (See footnote 14) quoted me as in support of his position on the TEAM Act. See *Congressional Record*, H9530 (September 27, 1995).

13 See *Congressional Record*, S4822-S4823 (May 8, 1996).

14 As reported in BNA *Daily Labor Report*, 76 DLR A-4, E-1 (April 20, 1995).

the law, both prior and subsequent to assuming that position, is to make one's expertise available to the public at appropriate times and circumstances. This is a policy adhered to by the current Chairmen of the Federal Trade Commission, the Securities and Exchange Commission, the Federal Communications Commission, as well as the Environmental Protection Agency Administrator.

Past NLRB Chairmen have acted in a manner compatible with this tradition. Chairman Harry Millis, the second Chairman of the NLRB appointed by President Franklin Roosevelt, was, like myself, an academic (his field was labor economics) and an impartial arbiter. He taught for the most part at the University of Chicago although, like the first Chairman of the Board, J. Warren Madden, and myself, spent some time at Stanford.

Notwithstanding the arm's length relationship which a quasi-judicial agency has with both the White House and Congress, Chairman Millis, during his term, advised President Roosevelt on the need for amending the Wagner Act. And Chairman Paul Herzog, who presided over the Board during the difficult days of Taft-Hartley transition, stated that the statute required changes and advised President Harry Truman about Taft-Hartley itself. Chairman Herzog sent private memoranda to President Truman explaining the Board's position on labor legislation and expressed views on labor law reform to Congress as well.

Indeed, the best statement on this issue was made this week by Chairman Robert Pitofky of the Federal Trade Commission when, in an interview with *The Washington Post* he stated:

> It is not enough for regulatory agencies to simply enforce the laws entrusted to them .... It is equally important to decide whether the laws we are enforcing are up-to-date at a time when vast changes in global trade and the pace of technology rivalry have changed the very nature of competition.[15]

And, of course, as many of you may know, both federal judges and members of the United States Supreme Court have adopted a similar posture. For instance, Judge Abner Mikva, then Chief Judge of the United States Court of Appeals for the District of Columbia and, subsequently, Counsel to President Clinton, said of the Racketeer Influenced and Corrupt Organizations Act during a 1986 debate: "Civil RICO was bad legislation; it has turned out to be bad law. We ought to get rid of it."

Chief Justice Burger expressed his views in numerous articles and speeches on prison reform, the jury system, and alternative dispute resolution, advocating law reforms in such areas. Chief Justice Burger also engaged in open lobbying for changes in the Bankruptcy Act and later participated in a case involving the constitutionality of the

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[15] *The Washington Post* (Business Section, C1, Col. 1) June 4, 1996.

statute. Justice Ruth Ginsburg has repeatedly and appropriately spoken out on the importance of equal rights for women.

So I will continue to speak out on issues and add as best I can to the public debate. I will not be muzzled by any quarter as I carry out my duties as NLRB Chairman.

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I hope that this discussion has been useful to you and the public as we struggle with difficult legal and political issues relating to employee participation and labor policy as well as the future of baseball. Again, it is a pleasure to be with you here in Omaha today, notwithstanding the absence of the Stanford baseball team.

May this College World Series be the most dramatic yet -- and may Stanford return here yet again in '97.

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